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January 23, 2009

DECISION AND ORDER  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing  
Date of Filing: September 30, 2008  
Case Number: TSO-0681

This Decision concerns the eligibility of XXXXXXXXXXXX (the individual) to hold an access authorization (or security clearance) under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."<sup>1</sup> In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual should be granted an access authorization. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the DOE should grant the individual an access authorization.

**I. Background**

The individual is a DOE employee. In the course of completing a Questionnaire for National Security Positions (QNSP) in June 2006, the individual indicated that he had used marijuana within the past seven years and that, in 1989, he had used marijuana while holding a security clearance. Exhibit 4 at 38-39.<sup>2</sup> The local DOE security office (LSO) conducted a Personnel Security Interview (PSI) in June 2008 to inquire more deeply into these matters. Exhibit 3. The PSI did not resolve the LSO's concerns about the individual's illegal drug use, but rather revealed additional use of illegal drugs in the individual's past. The LSO ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to him. Accordingly, the LSO proceeded to obtain authority to initiate an administrative review proceeding.

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<sup>1</sup> Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a).

<sup>2</sup> The individual completed an electronic form of the QNSP, entitled Electronic Questionnaire for Investigations Processing, or e-QIP.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. Specifically, the DOE characterized this information as indicating that the individual had purchased and used illegal drugs generally from 1989 to 2002, and that he had engaged in conduct that tended to show that he was not trustworthy or reliable with respect to his use of marijuana while holding a security clearance in 1989. Exhibit 1 (citing 10 C.F.R. § 710.8 (k) and (l), respectively).<sup>3</sup>

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the LSO forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on October 1, 2008.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, his wife, two supervisors, a co-worker, and a long-time friend. The DOE Counsel submitted five exhibits prior to the hearing, and the individual presented three exhibits at the hearing.

## **II. Regulatory Standard**

A hearing under Part 710 is held “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization,” i.e., “to have the substantial doubt regarding eligibility for access authorization resolved.” 10 C.F.R. § 710.21(b)(3), (6). It is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question

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<sup>3</sup> Criterion K relates, in relevant part, to information that a person “used . . . a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician . . . or as otherwise authorized by Federal law.” 10 C.F.R. § 710.8(k) (Criterion K).

Criterion L relates, in relevant part, to information that a person “[e]ngaged in any unusual conduct or is subject to any unusual circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . . .” 10 C.F.R. § 710.8(l) (Criterion L).

of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).<sup>4</sup> After due deliberation, I have determined that the individual should be granted an access authorization. The specific findings that I make in support of this decision are discussed below.

### **III. The Notification Letter and the Security Concerns at Issue**

In the Notification Letter, the LSO sets forth its concerns regarding the individual's eligibility for access authorization and the facts that support each of those concerns. The LSO cites the following derogatory information, provided by the individual during his PSI, for its security concerns under Criterion K: that he used marijuana from 1989 to 2002, that he used cocaine, mushrooms and LSD in 1991 and 1992, that he purchased marijuana, LSD and cocaine, and that he used marijuana in the summer of 1989 while holding a security clearance. With respect to its concerns under Criterion L, the LSO relied on the following information to which the individual admitted during his PSI: (1) that, in 1989, he stopped using illegal drugs two months before assuming summer employment that required a security clearance, so that he would not test positive on the required drug test, and (2) that he resumed using marijuana while holding a security clearance issued by another agency and with the knowledge that marijuana use was against his employer's policy and that of the issuing agency.

I find that the information set forth above constitutes derogatory information that raises legitimate questions regarding the individual's eligibility for access authorization under Criteria K and L. Use of illegal drugs raises questions about an individual's reliability and trustworthiness, not only because drug use may impair judgment, but also because it may indicate an inability or unwillingness to comply with laws, rules, and regulations. *See* Guideline H of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines). In addition, conduct that involves questionable judgment, dishonesty, or unwillingness to comply with rules and regulations—in this case, stopping illegal drug use for the purpose of obtaining a security clearance, and then resuming the behavior after obtaining the clearance—can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Adjudicative Guidelines at Guideline E.

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<sup>4</sup> Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, including knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

#### IV. Findings of Fact

The relevant facts in this case are not in dispute. The individual began experimenting with marijuana in the spring of 1989, when he was a freshman in college. Transcript of Hearing (Tr.) at 93. Shortly after he began using marijuana, he learned that his summer employment required that he take a drug test in order to obtain a security clearance for the position.<sup>5</sup> *Id.* To ensure that he would pass the drug test, the individual abstained from marijuana starting about two months before the date of the test. He did pass the test, and obtained the necessary clearance for the summer job. *Id.* While working at the job and holding the clearance, he resumed using marijuana, knowing that illegal drug use was against the policies of his employer and the agency that issued him the clearance. *Id.* at 93; Exhibit 3 (PSI) at 57-58, 62-64.

He returned to work for the same employer for several summers. Tr. at 102. After 1989, however, the employer changed its testing policy to random testing. *Id.* at 94. Faced with the possibility that he could have been required to take a drug test at any time, he refrained from using any illegal drugs while employed and holding a security clearance. *Id.* During the academic year, in contrast, he continued to use marijuana, throughout his undergraduate career. In 1991 and 1992, during the school year, he used cocaine four times, Exhibit 3 (PSI) at 68, psychotropic mushrooms once or twice, *id.* at 73, and LSD ten to twenty times. *Id.* at 98. At the hearing, the individual and his wife testified that 1991 and 1992 were the years he was most actively involved in the use of illegal drugs. *Id.* at 21 (testimony of wife), 98 (testimony of individual). This level of involvement coincided with living in a group house of college students, where the atmosphere encouraged such behavior. *Id.* at 21, 26 (testimony of wife), 94 (testimony of individual). He moved out of the group house in 1992, at which time his use of marijuana began to taper off and, but for one incident in 1995, he stopped using all other illegal drugs. *Id.* at 21, 42 (testimony of wife).

From his college graduation in 1993 through 1996, the individual pursued two additional degrees, separated by a period of employment with the same employer. In the academic environment, he continued to use marijuana, though with less frequency. *Id.* at 21 (testimony of wife), 95 (testimony of individual). He testified that he smoked marijuana at a “slightly reduced rate,” because his studies were more demanding and required more diligence. *Id.* at 95. As before, while employed and holding a clearance, the individual refrained from marijuana entirely. *Id.* At the hearing, the individual brought out the fact that he used LSD one last time in 1995, on the day before he left to start his master’s program as he had revealed in his PSI. *Id.* at 98; Exhibit 3 (PSI) at 69.

From 1996 to 2000, the individual worked full-time and used no illegal drugs. *Id.* at 10 (testimony of wife). In 2000, however, he entered graduate school in a state near his extended family. He and his wife both testified that he smoked marijuana a total of three times between

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<sup>5</sup> It remains unclear precisely what sort of clearance the individual was provided. See Exhibit 3 (PSI) at 56. For the purposes of analysis, it is irrelevant. What is of concern is the individual’s behavior both before and after being granted such clearance.

2000 and 2002. *Id.* at 11, 23 (testimony of wife), 96 (testimony of individual). One or two of those times involved smoking with one of his family members. *Id.* at 23 (testimony of wife). He further testified that smoking marijuana no longer made him feel the way it had in the early 1990s, and “progressively, each time I did it, [I] felt bad about myself until I finally said, that’s it.” *Id.* at 96. His wife testified that he last used marijuana in November 2002. She testified that he had told her he had decided to stop using marijuana because it made him feel old, it no longer fit his lifestyle, and it was not worth risking his future in his field. *Id.* at 11, 13, 15. He maintains that he has never used any illegal drugs since 2002, neither in the academic environment in which he remained until he received his Ph.D. in 2005, nor in the work environment since then. *Id.* at 98, 111.

Because the LSO did not indicate in the Notification Letter when and to what degree the individual had purchased illegal drugs, he provided this information, to the best of his ability, at the hearing. He testified that his purchases of marijuana, LSD, and cocaine correlated to his levels of usage: often people shared their marijuana, but the bulk of his purchases of any illegal drug would have been in 1991 and 1992, and his last purchases, of one tab of LSD and one bag of marijuana, both occurred in 1995. *Id.* at 98.

## **V. Hearing Officer Evaluation of Evidence**

The Criterion K raised by the LSO reflect the individual’s extensive history of illegal drug use, extending from 1989 to 2002. I have given careful consideration to the individual’s involvement with illegal drugs and conclude that it no longer presents a significant concern for the national security, for the following reasons. The individual began smoking marijuana as a college student, in an environment that encouraged such use and at a stage of life when he was immature and not seriously concerned about laws or societal norms. As his wife testified, he was testing boundaries. *Id.* at 29. By the time he received his undergraduate degree, at age 23, the period of his heaviest use of marijuana and, but for an isolated instance, his use of all other illegal drugs, had passed. From that point forward, his involvement with marijuana was considerably less serious, though he still smoked marijuana occasionally in the academic environment. When he took a job outside academia, from ages 26 to 30, he remained drug-free. At about the same time, the individual became more mature, according to his wife. *Id.* at 24. Returning to graduate school, he used marijuana three times within a two-year period. His testimony is that it made progressively less sense each time he smoked to risk his future, and he finally decided to stop entirely in November 2002.

In the context of personnel security, the individual’s history of disregarding the federal laws prohibiting the use of illegal drugs does not inspire confidence that he will obey rules and regulations, particularly those concerning the safeguarding classified material, in the future. A common-sense consideration of all the evidence, however, leads me to conclude that he is in fact at low risk of using illegal drugs in the future or disregarding laws, rules, and regulations of any sort. The individual testified, and I agree, that he arrived at his current, mature position of leading a drug-free life through a gradual progression, from heavy use as an undergraduate,

through occasional use as a graduate student, to not using any illegal substances for at least six years. *Id.* at 96-97, 109-110. Not only did the environment change; so did the individual's maturity. He no longer is subject to the peer pressure that encouraged using illegal drugs. Even now, marijuana is freely available where he lives: he sees it offered at parties, and he sees it sold on the streets. *Id.* at 39 (testimony of wife). Nevertheless, it holds no attraction for him. He is dedicated to his work, which requires all of his intellect, and his athletic pursuits, including rock climbing and motorcycling, which demand his focus and caution. *Id.* at 62, 64 (testimony of supervisor). He now has the foresight to understand the risk to his professional career as well as to his physical health and safety in recreational drug use. *Id.* at 109. In addition, he expressed sincere regret at the hearing for using illegal drugs, particularly for his most recent episodes in 2000 to 2002. *Id.* at 110. Finally, his supervisors and a co-worker testified to his clear commitment to the protection of hazardous materials and sensitive information. *Id.* at 49-50, 59, 73, 77-80. In light of this evidence, I conclude that the individual is a very different person than he was nearly 20 years ago when he was in college, and quite changed even from the graduate student he was six years ago. Consequently, I find that the individual has sufficiently mitigated the LSO's concerns under Criterion K regarding his involvement with illegal drugs.

The LSO invoked Criterion L with regard to a single incident that occurred before and during the summer following his first year of college, when he was 19 years old. Abstaining from marijuana for the express purpose of passing a drug test and resuming marijuana use once granted access on the basis of that test clearly raises serious questions about an individual's judgment, honesty, reliability and trustworthiness. In this case, however, the sum of the evidence mitigates those concerns. First of all, this incident occurred nearly 20 years ago, when the individual was immature, both chronologically and socially. As stated above, I find that he has matured in several respects in the intervening years. He clearly recognizes that his behavior in 1989 was shameful, and expressed his regret both at the PSI and at the hearing. Exhibit 3 (PSI) at 62-64; Tr. at 102-03. More telling, he has consistently demonstrated his straightforward nature throughout this proceeding. There is no evidence that the individual has, even inadvertently, misrepresented or omitted any relevant information in the course of his security investigation. Instead, he has, in contrast, overstated and highlighted information against his interest: the number of times he used each illegal drug, his last use of LSD in 1995, and the 1989 incident.<sup>6</sup> Tr. at 93, 98, 102-03. Finally, as stated in the above paragraph, his witnesses who work with him now testified that he is extremely conscientious and vigilant concerning matters of security.

The individual's maturity and life experience demonstrates to me that he will no longer employ the extremely poor judgment he relied on in 1989 when faced with decisions in the future. After considering the "whole person," I am convinced that the DOE can rely on the individual's ability to make sound judgment calls regarding the safeguarding of classified information. *See*

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<sup>6</sup> At the hearing, he presented evidence that the permission he was granted in 1989 was licensee access, and probably not a security access *per se*. He stated that when he responded in the affirmative to the question on the QNSP regarding whether he had used marijuana while holding a "security clearance," he did so in an abundance of caution. *Id.* at 102-03.

Adjudicative Guidelines at ¶ 2(a). I therefore find that the individual has sufficiently mitigated the LSO's concerns under Criterion L.

## **VI. Conclusion**

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria K and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has brought forth evidence to sufficiently mitigate the security concerns. I therefore find that granting the individual's access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I have determined that the individual's access authorization should be granted. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

William M. Schwartz  
Hearing Officer  
Office of Hearings and Appeals

Date: January 23, 2009